United States Department of Labor
Employees' Compensation Appeals Board

E.W., Appellant	)	
and	)	**Docket No. 07-2260**
	)	**Issued: October 8, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Aurora, CO, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On September 5, 2007 appellant filed a timely appeal from a May 7, 2007 loss of wage-earning capacity decision[1] and a June 22, 2007 decision denying her request for modification of the loss of wage-earning capacity decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to reduce appellant's compensation benefits based on her actual earnings; and (2) whether appellant has met her burden of proof to modify the May 7, 2007 wage-earning capacity determination.

[1] The Board notes that by another decision dated May 7, 2007, the Office denied appellant's claim for disability compensation for the period November 11 to 17, 2006. It noted that appellant had failed to supply her pay stub for the relevant period as requested in the December 12, 2006 letter. As she did not appeal from this decision, the Board has not reviewed it.

FACTUAL HISTORY

On July 21, 2001 appellant, then a 32-year-old city carrier, filed a traumatic injury claim alleging that on that date she strained her back while lifting a heavy parcel from a vehicle. The Office accepted the claim for cervical and thoracic strains, which was subsequently expanded to include a temporary aggravation of major depressive disorder and temporary aggravation of panic disorder. It placed appellant on the periodic rolls for temporary total disability by letter dated March 22, 2004.

On April 26, 2006 appellant informed the Office that she had started part-time work on April 10, 2006 with Noble Truss Colorado, Inc. as a temporary worker earning $8.00 per hour.[2] In letters dated September 27 and October 2, 2006, Ron Weaver, Operations Manager, informed the Office that appellant was working full time for Noble Truss as of August 14, 2006.

In determining whether appellant was capable of working full time, it reviewed the following medical documents. In a July 11, 2006 prescription note, Dr. Julius J. Budnick, a treating physician, provided restrictions of no lifting or carrying more than 10 pounds and no pushing/pulling more than 15 pounds. He indicated that appellant could work four hours per day.

On September 7 and 12, 2006 Dr. Katharine J. Leppard, a second opinion Board-certified physiatrist with a subspecialty in pain medicine, based upon a review of medical evidence, employment injury history and physical examination, diagnosed chronic left periscapular and cervical myofascial pain and left ulnar neuritis due to the accepted July 21, 2001 employment injury. A physical examination revealed "severe myofascial involvement with spasm and trigger points throughout the "left upper trapezius, rhomboid and cervical paraspinal muscles. Dr. Leppard also reported a positive Tinel's sign at the elbow and "significant tenderness over the left ulnar nerve at the elbow." She opined that appellant was unable to perform her date-of-injury position, but would be able to work with restrictions. The restrictions noted by Dr. Leppard included no lifting, pushing or pulling more than 10 pounds and no reaching or overhead work using her left shoulder. She noted that these restrictions were temporary pending the results of a left shoulder magnetic resonance imaging scan.

On October 18, 2006 a vocational rehabilitation counselor noted that appellant had worked for more than 60 days for her new employer, Noble Truss. She noted that appellant worked 40 hours per week as a receptionist at Noble Truss since August 14, 2006. The position duties and restrictions included a 10-minute break every hour and general clerical duties.

By decision dated May 7, 2007, the Office found that actual earnings in the position of receptionist for Noble Truss. fairly and reasonably represented appellant's wage-earning capacity. A wage-earning capacity computation worksheet reported the current pay rate for the date-of-injury job as $781.83 effective August 16, 2006 and in the position with Noble Truss appellant earned $321.08 per week. Compensation benefits were reduced effective May 2, 2007 based on a 41-percent loss of wage-earning capacity. The beginning date of appellant's new rate of compensation was May 3, 2007.

[2] The Board notes that the record contains evidence from another claimant.

In a letter dated May 12, 2007, appellant requested reconsideration. She noted that she reduced her work hours from eight hours to four hours per day on January 18, 2007 due to her depression and anxiety, which she noted were accepted conditions. Appellant also noted that her work hours were reduced that date because she had an Equal Employment Opportunity (EEO) deposition which caused her stress and depression. She also alleged that the claims examiner caused her stress and aggravated her depression. In support of her request, appellant submitted factual evidence regarding her EEO claim and four pages from her January 18, 2007 deposition.

On May 18, 2007 the Office received a January 16, 2007 report by Carrie L. Campen, a licensed professional counselor, who opined that appellant's anxiety and depression were aggravated by work factors including her feelings of harassment by the employing establishment, her work relocations and neck, shoulder and pain problems.

In a June 4, 2007 work capacity evaluation report (Form OCWP-5c) for psychiatric/psychological conditions, Ms. Campen indicated that appellant was only capable of working four hours per day. She noted that appellant was unable to work eight hours due to her chronic neck pain "and ongoing battles w[ith] depression and anxiety."

By decision dated June 22, 2007, the Office denied appellant's request for modification of the May 7, 2007 loss of wage-earning capacity decision.[3]

LEGAL PRECEDENT -- ISSUE 1

Section 8115(a) of the Federal Employees' Compensation Act[4] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[5]

The Office's procedure manual states that when an employee cannot return to the date-of-injury job because of disability due to work-related injury of disease, but does return to alternative employment, the claims examiner must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.[6] Office procedure manual provides in relevant part as follows:

> "Factors considered to determine whether the claimant's work fairly and reasonably represents his or her wage-earning capacity, the claims examiner

[3] On August 12, 2005 appellant filed a schedule award claim. As no final decision has been issued on appellant's request for a schedule award, the Board jurisdiction to consider this matter.

[4] 5 U.S.C. § 8101-8193.

[5] *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

should consider whether the kind of appointment and tour of duty ... are at least equivalent to those of the job held on the date of injury. Unless they are, the [claims examiner] may not consider the work suitable."

"For instance, reemployment of a temporary or casual worker in another temporary or casual [employing establishment] position is proper, as long as it will last at least 90 days and reemployment of a term or transitional [employing establishment] worker in another term or transitional position is likewise acceptable."[7]

The Office's procedure manual provides that the Office can make a retroactive wage-earning capacity determination if appellant worked in the position for at least 60 days, the position fairly and reasonably represented his wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.[8]

The formula for determining loss of wage-earning capacity based on actual earnings,[9] which was developed in *Albert C. Shadrick*,[10] has been codified by regulation at 20 C.F.R. § 10.403. Subsection (d) of this regulation provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury.[11]

ANALYSIS -- ISSUE 1

The Office accepted cervical and thoracic strains, which was subsequently expanded to include a temporary aggravation of major depressive disorder and temporary aggravation of panic disorder. Following a period of intermittent disability, appellant returned to part-time temporary work on April 10, 2006 and full-time work as a receptionist on August 14, 2006. Her weekly pay rate was $321.08. She performed this position without incident for more than 60 days.

The Board finds that appellant's performance of this position in excess of 60 days is persuasive evidence that the position represents her wage-earning capacity.[12] Moreover, there is

[7] *Id.* at § 2.814.7(a).

[8] *Id.* at § 2.814.7(e).

[9] *Hayden C. Ross*, 55 ECAB 455 (2004).

[10] 5 ECAB 376 (1953).

[11] 20 C.F.R. § 10.403.

[12] Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993); *see also E.C.*, 59 ECAB ___ (Docket No. 07-1634, issued March 10, 2008).

no evidence that the position was seasonal, temporary or make-shift work designed for her particular needs.[13]

As there was no evidence to show that appellant's actual earnings as a receptionist did not properly represent her wage-earning capacity, the Board finds that the Office properly accepted these earnings as the best measure of her wage-earning capacity.[14] Further, by dividing the pay rate for the date-of-injury job ($781.83) by the employee's actual earnings ($321.08), the Office properly determined a loss of wage-earning capacity of 41 percent.[15]

LEGAL PRECEDENT -- ISSUE 2

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless the original rating was in error, there is a material change in the nature and extent of the injury-related condition or that the employee has been retrained or otherwise vocationally rehabilitated. The burden of proof is on the party attempting to show a modification of the wage-earning capacity.[16]

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of the May 7, 2007 decision, contending that she had sustained a material change in the nature and extent of the injury-related condition such that she was only able to work part time. She stated that she reduced her work hours from eight to four on January 18, 2007 due to her depression and anxiety which were accepted by the Office. Appellant attributed the reduction in her work hours were to an EEO deposition, which she alleged caused her stress and depression.

The only evidence of record concerning appellant's reduction in work hours is a June 4, 2007 report from Ms. Campen, licensed professional counselor. To be considered competent medical evidence, a medical report must be from a physician under the Act.[17] Section 8101(2) provides that a physician includes, surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law.[18] A report may not be considered as probative medical evidence if there is

[13] *J.C.*, 58 ECAB ___ (Docket No. 07-1165, issued September 21, 2007); *Elbert Hicks*, 49 ECAB 283 (1998).

[14] *Afegalai L. Boone*, 53 ECAB 533 (2002).

[15] *Supra* note 10.

[16] *Selden H. Swartz, supra* note 5.

[17] *See Thomas L. Agee*, 56 ECAB 465 (2005); *James Robinson, Jr.*, 53 ECAB 417 (2002).

[18] *Thomas O. Bouis*, 57 ECAB 602 (2006).

no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8101(2).[19] A licensed professional counselor is not a physician as defined by the Act.[20] Thus, the report from Ms. Campen is not considered competent medical evidence and has no probative value in establishing that appellant's condition has materially changed such that she was medically unable to work more than four hours per day. There is no current psychological or psychiatric opinion of record. Thus, the weight of the medical evidence establishes that modification of the loss of wage-earning capacity decision is not warranted.

CONCLUSION

The Board finds that the Office properly determined on May 7, 2007 that appellant's position as a receptionist at Noble Truss fairly and reasonably represented her wage-earning capacity decision. The Board further finds that appellant failed to meet her burden of proof to modify the May 7, 2007 wage-earning capacity decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 22 and May 7, 2007 are affirmed.

Issued: October 8, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[19] *See Phillip L. Barnes*, 55 ECAB 426 (2004).

[20] 5 U.S.C. § 8101(2); *see also Roy L. Humphrey*, 57 ECAB 238 (2005); *Jeannine E. Swanson*, 45 ECAB 325, 336 (1993); *Arnold A. Alley*, 44 ECAB 912 (1993); *Ceferino L. Gonzales*, 32 ECAB 1591, 1594 (1981).